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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

OFFICE OF
SOLID WASTE AND EMERGENCY RESPONSE

MEMORANDUM

SUBJECT: Enforcement of Financial Responsibility Requirements
for RCRA Treatment, Storage, and Disposal Facilities
That Are Closing

FROM: J. Winston Porter,
Assistant Administrator

TO: Waste Management Division Directors
Regions I - X

This memorandum describes the Environmental Protection Agency's approach to enforcing regulatory requirements for both financial assurance for closure and post-closure care and liability coverage under the Resource Conservation and Recovery Act (RCRA) at treatment, storage, and disposal facilities that are closing.

A. Closure and Post-Closure Financial Assurances

1. Regulatory Requirements

Facilities are required under 40 CFR §265 Subpart H to establish financial assurance during their operating life for closure and post-closure care (§§265.143 and 265.145). Authorized states have established equivalent or more stringent requirements. In order to implement this regulation, Regions and states must review closure and post-closure plans for adequacy during the operating life of the facility to ensure that the amount of the financial assurance instruments is adequate. Close review of operating facilities will limit situations where facilities are in closure but have not established adequate financial assurance for closure or post-closure. When a facility closes, the Agency's goal is to ensure that closure is completed in an environmentally sound manner. In order to accomplish this, it is imperative that we carefully review closure and post-closure plans, cost estimates, and financial assurances when we know that the facility will be closing. If the owner or operator has not adequately addressed closure and post-closure activities and/or cost estimates and financial assurance for closure and post-closure, this must be addressed before closure plan and post-closure plan approval.

2. Economically Marginal Facilities Without Financial Assurance

Generally, violations of financial assurance requirements should be addressed by a formal enforcement action, with penalties. In the situation where a firm is "economically marginal," strict enforcement of the regulations, i.e., establishing financial assurance during the operating life of the facility, could drive such a company into bankruptcy with no guarantee that necessary corrective action will be assumed by Federal or state Superfund programs. It may be appropriate to allow economically marginal firms that did not establish financial assurance during their operating lives to meet their closure and/or post-closure obligations on a more flexible schedule. Regions and states should follow the principles outlined below when considering such an arrangement:

(1) , Any agreement must be formalized in an order. Owner/operators should be informed that failure to adhere to the terms of the order will subject them to further enforcement action.

(2) A firm must supply information to substantiate its financial status and demonstrate legitimate financial need. Please note that the burden of proof in establishing financial need lies with the owner or operator, who should volunteer the information in this situation. Evaluation of company financial strength should be made by qualified personnel. */

(3) A more flexible pay-in period for a trust fund should only be considered when all other options for financial assurance have been exhausted, A firm should demonstrate that a flexible pay-in period will substantially increase its ability to pay closure and post-closure costs.

(4) Alternate financial mechanisms or a combination of mechanisms (see §265.143(f)) should be considered, as well as other options, such as low interest loans for closure or post-closure costs available through the Small Business Administration.

(5) The length of time allowed to pay costs of closure or post-closure care using an installment plan schedule must be as short as the financial situation of the firm will allow. The actual rate of funding should be determined using ABEL or cash flow projections.

- * If Regions and states require assistance with financial evaluations they should consider the following: 1) Contractor assistance is available for this purpose; please inform your RCRA enforcement regional coordinator if you need assistance. 2) The computer program "ABEL" can also be used to determine the ability of a firm to pay closure costs, post-closure costs, and/or penalties.

B. Liability Coverage

Under the RCRA regulations, an owner or operator must continuously provide liability coverage for a facility as required until the certification of closure of the facility, as specified in §§264.115 and 265.115, is received by the Regional Administrator. Authorized states' regulations include equivalent or more stringent requirements.

The related memorandum, "Enforcement of Liability Requirements for Operating Facilities," dated October 29, 1986, advises that an operating interim status facility that cannot meet the liability requirement is to be placed on a compliance schedule, and if it does not comply in the time frame stated therein, must be compelled to close. It must be recognized, however, that the situation for closing interim status facilities without liability coverage is very different from that of operating facilities without liability coverage. While we may seek to compel a noncomplying operating facility to close, this sanction is not meaningful at a facility that is already closing.

We expect closing facilities to continue to make efforts to obtain liability coverage. However, the closing universe subject to liability requirements is diverse, and the ability of the owners and operators of these facilities to satisfy liability requirements varies. Enforcement personnel should consider the circumstances of the closing facility without liability coverage carefully. Closing facilities with violations of ground-water monitoring, closure/post-closure or financial assurance requirements must be accorded higher priority than facilities whose only violation is lack of liability coverage. In addition, when considering the priorities of the program, enforcement personnel may choose to defer enforcement action against a closing facility regarding a violation of liability requirements. Finally, closing facilities whose only violation is lack of liability coverage will not be regarded as significant noncompliers for SPMS purposes.

There will be instances where formal enforcement actions should be filed against closing facilities for violations of liability requirements, even if this is the facility's only violation. For example, a facility's parent may be able to pass the financial test for a corporate guarantee but may fail to submit the corporate guarantee or may fail to continue an insurance policy until certified closure. Once an enforcement action has been initiated, we also encourage enforcement personnel to consider requiring the noncomplying facility to have an alternative mechanism (i.e., a letter of credit) to assure payment of liability judgments. If the owner or operator agrees to obtain an alternative mechanism, the agreement must be formalized in an order. It may be appropriate under certain circumstances to include a penalty for failure to comply with the liability requirement, as well as appropriate penalties for other violations.

If you have any questions about this policy, or wish additional information or assistance, please call Jackie Tenusak, Office of Waste Programs Enforcement (FTS 475-8729).